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NO. 96-653
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

KENNETH LEE BAKER, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF OHIO, COLORADO, UTAH AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT GENERAL MOTORS CORPORATION

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and three other *amici* States wish to convey a narrow but important interest in this matter. We do not take sides with the parties on the underlying wisdom of the Michigan state court judgment. And we do not disagree with much of what our sister States have said about the risks of such a judgment in their *amici* brief supporting petitioner. *See* Amicus Brief of Missouri, *et al.* Instead, we wish to focus on a different risk -- the danger to our federalist structure and in the end to the States themselves of opening up a locally-managed public policy exception to the Full Faith and Credit Clause.

Crafted as an essential part of the Founders' plan to "form a more perfect Union," the clause requires States to respect the final judgments of their neighbors' courts. The commitment is not without cost, to be sure. The States must accept this obligation for better or worse, and therefore must respect judgments they might not have issued themselves. But, at the same time, the clause preserves the integrity of all State-court judgments in the aggregate, ensures the citizenry of each State that they will not have to relitigate final decisions anew in State after State, and carries with it its own safety valve -- the explicit authority of Congress to enact legislation modifying the effect of the clause.

What Justice Story said about the clause in the nineteenth century remains true today:

> What State has a right to proclaim, that the judgments of its own courts are better founded in law or in justice, than those of any other State? The evils of introducing a general system of reexamination of the judicial proceedings of other States, whose connections are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases.

Joseph Story, 3 Commentaries on the Constitution of the United States, § 1310 (Thomas M. Cooley, ed.1873). In view of the importance of preserving this vital glue that binds the States together, we offer this *amici* brief in support of respondent.

SUMMARY OF ARGUMENT

In unbending terms, Article IV, section 1 compels States to give the same respect to other judgments that they wish given to their own. They thus "shall" give "full faith and credit" to the "judicial proceedings of every other State" in the Union, leaving no room for a judicially-enforced public policy exception to the clause. But while the Framers did not permit the States to create *ad hoc* exceptions to the enforcement of other State-court final judgments, they did vest power in Congress to regulate the impact of the clause. In accordance with the second sentence of the clause, Congress may "prescribe" its "effect" by legislation. In exercising that power, Congress thus far has not chosen to create a broad public policy exception to the clause, or for that matter a narrow injunction exception.

The Court has been steadfast in adhering to the no-nonsense words of the clause and the statute. Starting with *Mills v. Duryee*, 7 Cranch 481 (1813), the Court made clear that the clause gave Congress power to "give a conclusive effect to such judgments" and had in fact done so. Id. at 485. *Fauntleroy v. Lum*, 210 U.S. 230 (1908), later emphasized the strict requirements of the clause: forcing the Supreme Court of Mississippi to give effect to a Missouri judgment that violated Mississippi's public policy against futures contracts, to do so with respect to a contract made

within Mississippi, and ultimately to honor a judgment that misread Mississippi law.

Nor does a literal reading of the Constitution and statute leave litigants without recourse. They may challenge the original judgment in the issuing court. And Congress of course remains empowered to address public policy concerns in legislating under the clause, as it has done on several occasions. *See, e.g.* 28 U.S.C. §1738A; §1738B. In conspicuous contrast, a changeable duty to enforce the clause could well have a disfiguring effect, jeopardizing state comity and risking the finality of agreeable as well as disagreeable State-court judgments. This Court has never recognized a public policy exception to the Full Faith and Credit Clause, and should not do so now.

ARGUMENT

I. Neither the Text of the Full Faith and Credit Clause Nor Its Implementing Legislation Contains a Public Policy or an Injunction Exception.

A. The Text of the Clause Does Not Contain Any Such Exception.

> Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

U.S. Const, Art. IV, § 1.

The Full Faith and Credit Clause constitutionalizes the golden rule. By establishing that the States "shall" give "full faith and credit" to the "judicial proceedings of every other State" in the Union, the clause compels each State to give the same full respect to other judgments that it wishes to see given to its own. The clause thus simultaneously gives and takes State power: It ensures the States that their final judgments will be respected across State lines but at the same time requires them to accord full respect to the judgments of others.

Nothing about the words of the first sentence to this give-and-take requirement offers any hint that State courts retain discretion to pick and choose which final judgments to honor. The obligation under the clause is mandatory in nature (using the imperative "shall"), and must be given to its "full[est]." Nor is there anything agnostic about the object of that duty -- to give "faith and credit" to all "judicial proceedings" of other States, whether agreeable or disagreeable, whether in law or in equity.

The context of the clause amplifies this conclusion. Having set forth the powers of the branches of the national government in the first three articles, the Framers appropriately used Article IV to address important State rights and State responsibilities in our federal scheme. Section one compels the States to honor the "acts, records, and judicial proceedings" of their sister States. Section two establishes privileges and immunities for State citizens and extradition rights of the States. Section three establishes a procedure for admitting new States to the Union by Congress as well as congressional power over United States property and claims. And section four guarantees a republican form of government to the States along with protection from invasion. All sections considered, Article IV embodies the necessary requirements of a compact among the several

States on the one hand and between the United States and the States on the other. An exception-ridden Full Faith and Credit Clause, which could be altered whenever a need for alteration was found, would undermine one of the essential components of the article.

But the most compelling textual evidence on this score comes not from the context of the clause or the words of its first sentence. Rather it comes from the second sentence of the clause, which in no uncertain terms vests Congress with the power to "prescribe" the "effect" of the judicial proceedings in one State in those of another. When it came to developing public policy in this area, in other words, the Framers explicitly established that Congress, not State or federal courts, would police and monitor the Clause's operation, and where necessary modify its impact. This was a quintessentially appropriate allocation of power to the national government -- in view of the parochial risks of leaving to the States the job of determining the effect of a neighbor's judgment in their own courts – and no less appropriate to vest this power in Congress, which is so well suited to resolving the kinds of national public policy issues that could arise under the clause. In the final analysis, the first sentence of the clause creates an obligation strictly enforceable in this Court, and the second sentence gives Congress power to modify that obligation for a variety of public policy reasons.

B. The Full Faith and Credit Statute Does Not Permit Public Policy Or Injunction Exceptions.

Exercising the power given to it, Congress has in fact passed legislation under the clause and first did so almost immediately after the Constitution was ratified, passing

initial legislation in 1790. 1 Stat. 122. In its essentially unchanged form, the statute now reads:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1997).

The legislation clarifies that all courts in the Union must obey the requirement, not just those of the States. And, in ensuring that these courts must give the "same" full faith and credit that the original court would have given the judgment, the legislation emphasizes that courts are bound to treat a judgment with the same respect due it in the court of origin. Conspicuously missing from the statute, like the constitutional clause before it, is any judicial leeway to exempt disagreeable judgments generally or injunctions specifically from its coverage.

II. The Framers Intended To Give Congress, Not State And Federal Courts, Power To Modify And Implement The Full Faith and Credit Clause.

The respect due the judgment of one jurisdiction in that of another was not a new one in 1787. Colonial courts as well as English courts at common law had long wrestled with the problem. While the phrase "full faith and credit" had little usage prior to its appearance in the Articles of Confederation, the terms "faith" and "credit" were frequently used in this context in English law from at least

the sixteenth century, most frequently to denominate the effect of ecclesiastical court decisions or foreign judgments in common law courts.

In all fairness, however, neither the English common law experience nor the colonial experience is conclusive. In some instances, the terms "faith" and "credit" were indeed used by English courts in giving complete and preclusive effect to judgments of foreign courts. *See Burroughs v. Jamineau,* 25 Eng. Rep. 235 (Ch. 1726) (chancery court gave preclusive effect to foreign judgment in granting an injunction)*; Badtolph v. Bamfield*, 23 Eng. Rep. 102 (Ch. 1674) (chancery court gave effect to Icelandic judgment); *Jurado v. Gregory*, 86 Eng. Rep. 23 (K.B. 1670) (English court gave preclusive effect to a "sentence obtained in a foreign Admiralty"). At the same time, however, other English cases cast doubt on the consistency of this tradition. *See Dupleix v. DeRoven*, 23 Eng. Rep. 950 (Ch. 1705) (French judgment not given preclusive effect in England); *Gage v. Bulkeley,* 27 Eng. Rep. 824 (Ch. 1744) (debt upon a foreign judgment given only evidentiary effect); *Walker v. Witter,* 99 Eng. Rep. 1 (K.B. 1778) (foreign judgments were grounds of action but reexaminable; "faith" used to indicate conclusive effect); *Galbraith v. Neville*, 99 Eng. Rep. 5 (K.B.1789) (foreign judgment given the evidentiary effect of any other record or written agreement).

But the lack of conclusiveness about these traditions has less to do with the meaning of the words "faith" and "credit" than it does with the inaptness of the comparison. Neither the English nor the colonial court experience with "foreign" judgments is apt in view of the clause's applicability solely to the States of a Union. And neither experience involved a judicial system that combined law and equity, with all decisions under federal law finally determinable in a national supreme court.

Against this historical backdrop, a full faith and credit clause was added to the Articles of Confederation in 1777. The clause read as follows:

> Full Faith and Credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

19 Journals of the Continental Congress, Ford ed., 214, 215 (1912). Few cases construed the clause, and the cases that did offer little insight into its meaning. The same language was then incorporated in the United States Constitution, except that the Framers added an "effects" clause.

The notes of the constitutional debates reveal that the Framers sought to give the Full Faith and Credit Clause more binding and preclusive effect than the antecedent clause in the Articles of Confederation. "[J]udgments in one state," some delegates explained "should be the ground of actions in other states." 2 Farrand, The Records of the Federal Convention of 1787, rev. ed., 447-489 (1911). James Wilson of Pennsylvania advocated that the legislature should "declare the effect" of the clause; otherwise "the provision would amount to nothing more than what now takes place among all independent nations." Farrand, *supra*, at 483; *see also*, *Huntington v. Attrill*, 146 U.S. 657, 684 (1892) (referring to "the less perfect provision" of the Articles of Confederation).

Madison likewise recognized the importance of giving Congress the power to ratchet up or ratchet down the effect of the clause:

> The power of prescribing, by general law, the manner in which the public acts, records, and

> judicial proceedings of each state shall be proved, and the effect they shall have in other states, is an evident and valuable improvement on the clause relating to the subject in the articles of confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contingent States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.

The Federalist No. 42. Nowhere in the debates or other materials surrounding the passage of the clause in the Constitution is the question of an exception based on public policy or injunctive relief raised. *See* Farrand, *supra*, at 445-449 (1911).

III. This Court's Holdings Make No Exception To The Clause For Public Policy Reasons or Injunction Decisions.

In the immediate years after the ratification of the Constitution and the passage of full faith and credit legislation, several States resisted honoring the final judgments of other jurisdictions. For example, in *Hitchcock v. Aicken*, 1 Cai. R. 460 (N.Y. 1803), the highest court of New York refused to give preclusive effect to a judgment obtained in Vermont. The same court, in *Taylor v. Briden*, 8 Johns. R. 172 (N.Y. 1811), held that a judgment from Maryland had only *prima facie* evidentiary effect in New York. Other State courts reached similar results. *See Wright*

v. Tower, 1 Browne's Rep. App.1 (Pa. 1801) (Act of 1790 did not determine effect of judgments of courts from other states); *Hammon and Hattaway v. Smith*, 3 S.C. L. (1 Brev.)110 (1802) (North Carolina judgment only *prima facie* evidence of debt in South Carolina court; act of Congress did not declare effect of judgments from other States); *Bartlett v. Knight*,1 Mass Rep. 401 (1805) (New Hampshire judgment did not have to be given effect in Massachusetts).

Not until *Mills v. Duryee*, 7 Cranch 481 (1813), did the Supreme Court have an opportunity to clarify the binding nature of the full faith and credit obligation. At issue in *Mills* was whether a judgment issued by a court in New York had conclusive effect in a court of the District of Columbia. Writing for the Court, Justice Story concluded:

> It is manifest . . . that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision.

Id. at 485.

Story later elaborated on this view in his widely-read *Commentaries*:

> [W]hat, then is meant by full faith and credit? Does it import no more than that the same faith and credit are to be given them, which, by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive

> efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause.

Story, *supra,* §1309.

"[W]ithout question," Story also viewed the clause as designed to cure the lack of preclusive effect given by post-Articles of Confederation State courts. *Id.* at §1309. In discussing the ties that necessarily bound the States of the new Union, Story added:

> Under such circumstances, it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one State, should be open to litigation again and again as often as either of the parties, or their privies should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and reexamine all the merits of the case. It might be done at a distance from the original place of the transaction; after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case.

Story, *supra*, §1309.

The Court continued to adhere to these principles throughout the nineteenth century. See, e.g., *Hampton v. McConnel*, 3 Wheat. 234 (1818) (New York judgment given effect in South Carolina); *Mayhew v. Thatcher* et al., 6 Wheat. 129 (1821) (Massachusetts judgment given effect in Louisiana); McCormick v. Sullivant, 10 Wheat. 192 (1825) (unreversed decree a bar to action in another State); *Christmas v. Russell*, 5 Wall. 290 (1866) (judgment of Kentucky court given preclusive effect in Mississippi; rejects arguments for public policy exception); *Cheever v. Wilson,* 9 Wall. 108 (1869) (divorce decree from Indiana valid in Washington, D.C. despite public policy against decree in Washington).

Nor did the Court make any exception for equitable decrees. In 1847, it found that alimony payments, as ordered by the Court of Chancery of New York, must be given binding force in all other States. *See Barber v. Barber*, 21 How. 582, 591 (1847). The Court reached a similar conclusion some sixty years later in *Sistare v. Sistare*, 218 U.S. 1 (1910), in which it held that a judgment for alimony must be accorded full faith and credit. More recently, in *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Ass'n*, 455 U.S. 691, 716 (1982), the Court accorded full faith to the judgment of an Indiana rehabilitations court and its power to enjoin suits that may interfere with the receivership process.

The Court continued to resist litigants' efforts to create a public-policy exception to the full faith and credit requirement at the dawn of the twentieth century. In *Fauntleroy v. Lum*, 210 U.S. 230 (1908), plaintiff and defendant entered into a contract for "futures," which was illegal under Mississippi law. When a dispute over the contract arose, the parties submitted it to a Mississippi arbitrator who found for plaintiff. Plaintiff then sued in a

Mississippi court to recover on the arbitration award, but dismissed the action when the illegality of the contract was brought to the court's attention. Plaintiff next filed an action in a Missouri court, which rejected the illegality argument and upheld the arbitrator's decision. When plaintiff tried to enforce his Missouri judgment in Mississippi, the State court refused to give it full faith and credit because the underlying contract violated Mississippi law and because the Missouri court had misunderstood the relevant Mississippi law.

> "A judgment is conclusive," the Court reaffirmend, as to all the media concludendi; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law.

Id. at 237 (citation omitted). It is doubtful that a more compelling explanation for creating a public policy exception could be conceived than the facts of *Fauntleroy*. Still, this Court compelled Mississippi to give effect to a judgment that violated the State's public policy against futures contracts, forced it to do so with respect to a contract made *within* the State, and in the end required Mississippi to honor a judgment that misread Mississippi law.

Nor do any of the instances in which the Court has declined to give full faith and credit to State-court judgments advance petitioners' position. For example, when a court lacks jurisdiction over a person or the subject-matter of the dispute, its judgments need not be recognized by another jurisdiction. Yet that does not reflect on the force of the Full Faith and Credit Clause, but rather the time-honored doctrine that such decrees are void from the outset in *all* courts under principles of due process, including courts in the issuing State. *See, e.g., Durfee v. Duke*, 375 U.S. 106 (1963);

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

For like reasons, one State may not directly affect title to land located in another State. *Fall v. Eastin*, 215 U.S. 1 (1909). This, too, reflects a jurisdictional defect, as one State may never possess jurisdiction over the land in another State. *Id.* at 14. Nor may one State assume jurisdiction over the criminal laws of another State, which explains the penal exception to the clause. *See Huntington v. Attrill*, *supra* (prohibiting enforcement of a judgment to "punish an offence against the public justice of the state," rather than to "afford a private remedy to a person injured in a wrongful act").

Nor do the various policy arguments asserted by petitioners tenably advance the position that the courts, as opposed to Congress, retain authority to determine as a matter of policy which judgments warrant full faith and credit and which do not. No doubt the full faith and credit obligation has an extraterritorial effect, forcing courts to dignify a judgment they might not otherwise have issued themselves. But that is simply the nature of the clause and ultimately one of the bargains of a nation that created "one out of many." It is simply one of the necessary compromises of a workable Union that we "require[] a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." *Howlett v. Rose*, 496 U.S. 356, 383 (1990).

Nor does this view of the clause close off all avenues of recourse. Litigants of course may always challenge the original judgment in the issuing court, which may well be a particularly fruitful approach when it comes to challenging injunctions. And if general concerns arise about over- or under-enforcement of the clause, Congress "may by general

laws prescribe the . . . effect" of the clause, which it has done on several occasions. *See, e.g.*, 28 U.S.C. §1738A (1997) (full faith and credit due child custody determinations); 28 U.S.C. §1738B (1997) (full faith and credit due child support orders).

In the last analysis, a changeable duty to enforce the clause, while resolving the exigencies of the moment, would ultimately place at risk the enforceability even of the most agreeable judgments. Assume, for example, that the Michigan court in this instance had *permitted* the witness to testify in other actions against his former employee. A full-faith-and-credit rule that allowed judgments *prohibiting* testimony to be ignored could apply just as forcefully to those *permitting* such testimony. In short, aside from Congress's recognized power to legislate under the clause, the Court has never recognized a public policy exception to the Full Faith and Credit Clause. It should not do so now.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should resist petitioners' invitation to create a public-policy or injunction exception to the Full Faith and Credit Clause.

Respectfully submitted,

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